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No. 86-405

# In the Supreme Court of the United States

OCTOBER TERM, 1986

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HAMID R. KASHANI, PETITIONER

*v.*

ALAN C. NELSON, COMMISSIONER OF THE IMMIGRATION AND NATURALIZATION SERVICE

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

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## BRIEF FOR THE RESPONDENT IN OPPOSITION

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## QUESTION PRESENTED

Whether a deportable alien, before seeking judicial review of an administrative denial of his asylum claim, must first exhaust his administrative remedies by renewing that claim in deportation proceedings.

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 793 F.2d 818. The order of the district court dismissing petitioner's complaint (Pet. App. 21a-23a) is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on June 12, 1986. The petition for a writ of certiorari was filed on September 10, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Petitioner entered the United States on January 4, 1976, on a nonimmigrant student visa (F-1) authorizing him to study at Purdue University. Petitioner's authorized stay in the United States ended on July 10, 1982, but petitioner remained in this country unlawfully.[1] On October 14, 1982, petitioner filed an application for asylum with a district director of the Immigration and Naturalization Service (INS), as permitted by 8 C.F.R. 208.3(a)(2). The application was denied on October 20, 1983, because petitioner did not establish a well-founded fear of persecution under the provisions of 8 U.S.C. 1158. In lieu of instituting deportation proceedings, the district director, pursuant to 8 C.F.R. 208.8(f)(4), granted petitioner the privilege of voluntary departure from the United States by November 20, 1983. Pet. App. 1a-3a.

Petitioner did not voluntarily depart from the United States by November 20, 1983. Instead, on

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[1] One who enters the United States on a student visa and then stays beyond the time authorized is "in the United States in violation of [the Immigration and Nationality] Act" (8 U.S.C. 1251(a)(2)), would commonly be referred to as an "illegal alien," and is deportable under both 8 U.S.C. 1251(a)(2) and 8 U.S.C. 1251(a)(9). See, *e.g.*, T. Aleinikoff & D. Martin, *Immigration Process and Policy* 376 & n.30 (1985). Petitioner therefore errs in suggesting that he was lawfully in this country until the district director declared otherwise (Pet. 15).

We note that petitioner's unlawful presence in this country began after January 1, 1982. Petitioner therefore is not eligible for legalization of his status under Section 245A(a)(2)(A) and (B) of the Immigration and Nationality Act, added by Section 201 of the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603 (Nov. 6, 1986) (*reprinted in* 132 Cong. Rec. H10076 (daily ed. Oct. 14, 1986)).

that date, he filed an action in the district court seeking injunctive relief against INS's commencing deportation proceedings, and for judicial review of the district director's denial of his asylum claim. The complaint alleged that the district director abused her discretion by failing to consider the relevant evidence submitted in support of his asylum claim. On September 11, 1984, the district court dismissed the complaint, holding that an applicant for asylum must renew his request for asylum in deportation or exclusion proceedings before seeking judicial review, which lies in court of appeals under 8 U.S.C. 1105a (Pet. App. 23a).

On September 24, 1984, the district director issued an order to show cause why petitioner should not be deported. On November 9, 1984, petitioner appealed the district court's order.

The court of appeals affirmed. After an exhaustive review of the statutory scheme, it concluded that Congress did not intend to permit judicial review before a deportable alien exhausted his administrative remedies by renewing his asylum application in deportation proceedings (Pet. App. 17a).

## ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Review by this Court is therefore not warranted.

1. The Refugee Act of 1980, Pub. L. No. 96-212, § 201(b), 94 Stat. 105, added a new Section 208, 8 U.S.C. 1158, to the Immigration and Nationality Act of 1952 (the Act). Section 208(a) directs the Attorney General to "establish a procedure for an alien physically present in the United States or

at a land border or port of entry, irrespective of such alien's status, to apply for asylum." [2]

The asylum procedure established by the Attorney General is contained in 8 C.F.R. Pt. 208 and is correctly summarized in *Yiu Sing Chun* v. *Sava*, 708 F.2d 869, 873 (2d Cir. 1983) (footnotes omitted): "There are five steps in the asylum procedure: preparation and filing of the application for asylum, examination in person by an immigration officer or judge, an advisory opinion from BHRHA [the State Department's Bureau of Human Rights and Humanitarian Affairs], a written decision of the District Director, which may not be appealed, and renewal of the denied asylum request before an immigration judge in exclusion or deportation proceedings."

Petitioner contends that he may secure judicial review of a denial of asylum after the first four steps of this procedure, without undergoing the fifth step. No decision of any court supports that result.

2. Petitioner seeks support for his argument in this Court's decisions in *Cheng Fan Kwok* v. *INS*, 392 U.S. 206 (1968), and *INS.* v. *Stanisic*, 395 U.S. 62 (1969) (Pet. 3-7). Neither case, however, involved an application for asylum under the Section 208 procedures, and neither case involved any question at all of exhaustion of administrative remedies. In *Cheng Fan Kwok*, the Court held that the district

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[2] Section 208(a) goes on to state that "an alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title." Petitioner is therefore quite wrong to assert that "refugee status * * * has nothing to do with an asylum application which is decided under the INA § 208(a), 8 U.S.C. § 1158(a)" (Pet. 7). See also *INS* v. *Stevic*, 467 U.S. 407, 423 n.18 (1984).

court rather than the court of appeals had initial jurisdiction to review a district director's denial of a stay of deportation *after* deportation proceedings had been concluded. There was no contention in the case that the denial of the stay of deportation was unreviewable because of a failure to exhaust administrative remedies; the only jurisdictional dispute was whether the district court or court of appeals should hear the case in the first instance.

In *Stanisic*, there was again no assertion that the alien, who had been denied "asylum" [3] by the district director, had failed to exhaust his administrative remedies. Indeed, the issue in the case was whether, under statutes and regulations then in effect, the alien was entitled to an administrative remedy that he had sought and had been denied. Petitioner, by contrast, has not sought the administrative remedy of a grant of asylum by the immigration judge in deportation proceedings, an administrative remedy that is indisputably available to him (8 C.F.R. 208.9). The Court's statement in *Stanisic* that the district court had jurisdiction (395 U.S. at 68 n.6), like the holding in *Cheng Fan Kwok*, indicates only which of two possible courts had initial jurisdiction over a controversy that everyone agreed was justiciable. It has nothing whatsoever to do with petitioner's

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[3] What the Court termed "political asylum" in *Stanisic* (395 U.S. at 70) was in fact relief from deportation under either Section 212(d)(5) of the Act, 8 U.S.C. 1182(d)(5), or Section 243(h) of the Act, 8 U.S.C. 1253(h) (395 U.S. at 70). What is now called "asylum," and specifically so labeled in 8 U.S.C. 1158, is a different (and greater) form of relief, obtained through the procedures established after passage of the Refugee Act of 1980. See generally *INS* v. *Stevic, supra; Cardoza-Fonseca* v. *INS*, 767 F.2d 1448 (9th Cir. 1985), cert. granted, No. 85-782 (Feb. 24, 1986).

claim that his asylum request is justiciable in advance of his exhaustion of administrative remedies.

3. Petitioner also claims that the decision below conflicts with decisions of several other circuits (Pet. 8-13). Each case on which petitioner relies is entirely consistent with the decision below.

In *Salehi* v. *District Director, INS*, 796 F.2d 1286 (10th Cir. 1986), the issue yet again was which of two courts had initial jurisdiction over the controversy, and not whether the aliens had exhausted necessary administrative remedies. Unlike petitioner, the aliens in *Salehi* had long since concluded deportation proceedings (796 F.2d at 1287), and, as in *Cheng Fan Kwok*, they sought relief from actions of the district director taken *after* a deportation order was entered. The decision says nothing about the ability of a deportable alien to seek judicial review of a district director's denial of asylum *before* undergoing deportation proceedings.

In *Yiu Sing Chun* v. *Sava*, *supra*, the aliens' asylum applications were denied by district directors, and they sought an exclusion hearing before an immigration judge, so as to renew their applications under 8 C.F.R. 208.9. INS denied their request for an exclusion hearing notwithstanding 8 C.F.R. 208.9 on the ground that, as stowaways, they were denied the right to such a hearing by 8 U.S.C. 1323(d). When the aliens sought habeas corpus in the district court, the government obviously could not and did not contend that the aliens had failed to exhaust the administrative remedy of renewing their applications before an immigration judge, for the government contended that they had no such remedy. The district court, agreeing with the government, proceeded to

review the district directors' decisions on the merits.[4] The court of appeals, holding that the aliens were entitled to an exclusion hearing at which they could renew their asylum claims (708 F.2d at 874-875), remanded for further *administrative* proceedings (*id.* at 877). Because it held that the aliens had a right to renew their applications before an immigration judge, the court explicitly declined to resolve "the substantive question whether petitioners are in fact entitled to be treated as asylees" (*id.* at 876). The decision, therefore, is precisely in line with the holding in this case that a court should await the immigration judge's decision before reviewing a denial of asylum on the merits.

*Stanisic* v. *INS*, 393 F.2d 539 (9th Cir. 1968), as explained above in the discussion of *INS* v. *Stanisic*, 395 U.S. 62 (1969), did not involve an application

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[4] The district court, in a holding that was neither endorsed nor rejected by the court of appeals, disagreed with the government's argument that it lacked jurisdiction to review the district directors' claims on the merits. The government's argument was not, however, that the aliens had failed to exhaust administrative remedies. See *Yiu Sing Chun* v. *Sava*, 550 F. Supp. 90, 92-93 (E.D.N.Y. 1982). The district court's decision therefore provides no support for petitioner's assertion that a court may review the merits of an asylum determination before the alien exhausts his administrative remedies. In addition, the district court's assertion of jurisdiction was based on the theory that the aliens in that case were entitled to seek habeas corpus under Section 106(b) of the Act, 8 U.S.C. 1105a(b). 550 F. Supp. at 93. Section 106(b) applies only to aliens who are being *excluded* from the country before entry, not to aliens like petitioner who are subject to deportation from the country after entry. Accordingly, whatever the merits of the district court's theory, it rested on a statutory basis that does not apply to petitioner.

for asylum under the Section 208 procedures, which did not then exist. It also did not involve any contention that the alien had failed to exhaust his administrative remedies.

The next three cases on which petitioner relies were all challenges to denials of asylum under the pre-Refugee Act regulations found in 8 C.F.R. Pt. 108 (1980). See *Medina* v. *Castillo*, 627 F.2d 972, 973 nn.1 & 2 (9th Cir. 1980); *Fleurinor* v. *INS*, 585 F.2d 129, 134 (5th Cir. 1978); *Haitian Refugee Center* v. *Smith*, 676 F.2d 1023, 1026 n.1, 1027 n.6 (5th Cir. 1982). Under those regulations, an alien could seek asylum *only* from the district director and could not renew his application in deportation or exclusion proceedings. The alien did, however, have a right to seek withholding of deportation under Section 243(h) of the Act, 8 U.S.C. 1253(h), in a subsequent deportation proceeding notwithstanding prior rejection of his asylum claim by a district director (see *INS* v. *Stevic*, 467 U.S. at 420-421).

In *Medina* and *Fleurinor*, the government did not argue that the right to seek withholding of deportation (a lesser benefit than asylum) in his deportation proceeding meant that the alien must undergo that proceeding before seeking judicial review. The courts accordingly found direct judicial review of a district director's asylum determination to be proper. In *Haitian Refugee Center*, the government did argue that the aliens were required to exhaust their administrative remedy by seeking withholding before they could obtain judicial review of asylum claims, and the court, for purposes of its decision, agreed: "When the correctness of an asylum denial is at issue, * * * the policy of securing more complete development of the factual record is advanced by re-

quiring the alien to seek withholding * * *" (676 F.2d at 1036). The court distinguished that principle, however, by noting that in that case "the [aliens] [we]re testing only the legality of the procedures used" (*ibid.*). Although the aliens had administrative remedies available insofar as they sought a determination on the merits that they had a well-founded fear of persecution, they had no administrative procedures to exhaust insofar as they challenged the procedure used by the district director (*ibid.*) That holding of *Haitian Refugee Center*, of course, is of no assistance to petitioner, who seeks to challenge his denial of asylum on the merits.

If, as the government contended and the court suggested in *Haitian Refugee Center*, an alien seeking review on the merits was required to undergo deportation proceedings before seeking judicial review, it follows a fortiori that exhaustion is required under the present regulatory scheme, which explicitly allows an alien to renew his asylum claim in deportation proceedings (8 C.F.R. 208.9). If, as suggested by *Medina* and *Fleurinor*, review of an asylum determination on the merits could be obtained in advance of a deportation proceeding, it was because then—unlike now—an alien could not seek in the deportation proceeding the same benefit, asylum, that he could seek from the district director. No matter what the correct exhaustion rule was under the pre-Refugee Act regulations, these cases provide no support for petitioner's contention that exhaustion is not required under the current regulations.

Finally, in *Jean* v. *Nelson*, 727 F.2d 957 (11th Cir. 1984) (en banc), aff'd on other grounds, No. 84-5240 (June 26, 1985), there was no challenge to the merits of any asylum determination. The court did nothing

more than follow *Haitian Refugee Center* in holding that "the existence of unexhausted administrative remedies * * * applicable to an alien's opportunity to apply for asylum before the immigration judge * * * cannot justify invoking the exhaustion doctrine with respect to a challenge to the *procedure* before the district director" (727 F.2d at 981 (emphasis added)). Since petitioner is challenging the merits of the district director's determination that he is ineligible for asylum, and not the procedure used, *Jean* does not support his claim that he need not exhaust administrative remedies.

In sum, no court of appeals has ever held, or even suggested, that under the *current* asylum regulations a deportable alien may obtain judicial review of the merits of a district director's asylum determination before the alien exhausts his administrative remedies by renewing his application for asylum before an immigration judge in deportation proceedings.[5]

4. Aside from his erroneous interpretation of decisions of this Court and the courts of appeals, petitioner appears to offer two arguments in support of his claim that he should be excused from exhaustion of administrative remedies. First, he contends that the delay in eligibility for citizenship that might ensue from exhaustion warrants excusal from the requirement (Pet. 4-5). Imposition of an exhaustion requirement, however, always carries with it the potential for delay of the benefit sought (if the ap-

[5] In addition to his claim of a conflict in the circuits, petitioner claims that there is an intracircuit conflict in the Seventh Circuit (Pet. 16). Such a conflict would be of concern to that court, not this Court. *Wisniewski* v. *United States*, 353 U.S. 901 (1957). In any case, there is no conflict; none of the cited Seventh Circuit cases involved an asylum claim.

plicant does not succeed in the further administrative proceedings). That potential delay provides no greater reason to excuse asylum applicants from exhaustion of administrative remedies than to do so for anyone else.[6] Indeed, exhaustion of administrative remedies in this context carries with it not just the potential for delay of benefits, but also the certainty of delay of deportation. For deportable aliens who are not in custody, such as petitioner, that delay is quite valuable.

Second, petitioner appears to argue that because the immigration judge and Board of Immigration Appeals will not "review" the district director's asylum determination, that determination should be subject to judicial review (Pet. 5; see also *id.* at 13-15).[7] If petitioner is indeed so arguing, his contention is precisely backwards. The fact that petitioner will receive a de novo hearing on his asylum claim before the immigration judge, rather than a hearing to review the district director's determination of in-

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[6] Petitioner erroneously suggests (Pet. 5) that footnotes in this Court's opinion, the lower court's opinion, and our jurisdictional statement in *INS* v. *Chadha*, 426 U.S. 919 (1983), indicate that possible delay in obtaining immigration benefits is a sufficient reason to excuse exhaustion of administrative remedies. The cited footnotes indicate only that, because Chadha might become eligible for citizenship earlier if he prevailed in the court case than if he were granted citizenship on the basis of his recent marriage to an American citizen, his case was not moot.

[7] It is not clear that petitioner is in fact making this argument, since the parts of his petition in which it might be found discuss district directors' decisions in general rather than focusing on asylum denials. This case, of course, involves asylum denials and not the myriad other decisions made by district directors.

eligibility for asylum, is more reason, not less, to require him to undergo that hearing before coming to court.[8]

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1986

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[8] In addition to holding that petitioner must exhaust his administrative remedies, the court of appeals suggested that a district director's decision to grant or deny asylum is unreviewable under the political question doctrine (Pet. App. 17a-20a). It would be inappropriate to grant certiorari in order to review that suggestion, whatever its merits, since the judgment of the court of appeals is independently supported by its correct holding that petitioner was required to exhaust administrative remedies.

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